Friday,
4th January, 1884

ABSTRACT OF THE PROCEEDINGS

OF THE

Council of the Governor General of India,

LAWS AND REGULATIONS

Vol. XXIII

Jan.-Dec., 1884

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ASSEMBLED FOR THE PURPOSE OF MAKING

LAWS AND REGULATIONS,

1884

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Abstract of the Proceedings of the Council of the Governor General of India, assembled for the purpose of making Laws and Regulations under the provisions of the Act of Parliament 24 & 25 Vic., cap. 67.

The Council met at Government House on Friday, the 4th January, 1884.

PRESENT:

His Excellency the Viceroy and Governor General of India, K.G., G.M.S.I., G.M.I.E., *presiding.*
His Honour the Lieutenant-Governor of Bengal, C.S.I., C.I.E.
His Excellency the Commander-in-Chief, G.C.B., C.I.E.
The Hon'ble J. Gibbs, C.S.I., C.I.E.
Lieutenant-General the Hon'ble T. F. Wilson, C.B., C.I.E.
The Hon'ble C. P. Ilbert, C.I.E.
The Hon'ble Sir S. C. Bayley, K.C.S.I., C.I.E.
The Hon'ble T. C. Hope, C.S.I., C.I.E.
The Hon'ble Sir A. Colvin, K.C.M.G.
The Hon'ble Durgá Charan Láhá.
The Hon'ble H. J. Reynolds.
The Hon'ble H. S. Thomas.
The Hon'ble G. H. P. Evans.
The Hon'ble Kristodás Pál, Raí Bahádur, C.I.E.
The Hon'ble Mahárájá Luchmessur Singh, Bahádur, of Darbhangá.
The Hon'ble J. W. Quinton.
The Hon'ble T. M. Gibbon, C.I.E.
The Hon'ble R. Miller.
The Hon'ble Amír Alí.
The Hon'ble W. W. Hunter, LL.D., C.I.E.

UNIVERSITIES HONORARY DEGREES BILL.

The Hon'ble MR. GIBBS moved that the Report of the Select Committee on the Bill to authorize the Universities of Calcutta, Madras and Bombay to grant certain honorary degrees be taken into consideration. He said, in making the Motion, that the Select Committee had considered the letters which were received from the various Governments forwarding the opinions of the Universities concerned, and, in accordance with those recommendations, they had made some slight alterations in the Bill so as to simplify the procedure. The Syndicates of those various Universities were not composed of the same number

of Fellows, and consequently the concurrence of four Members of the Syndicate, in reference to the conference of an honorary degree, would not work. The Bill had now been amended so as to require that two-thirds of the other Members of the Syndicate should concur with the Vice-Chancellor. The recommendation would then go to the Senate, which would finally submit it to the Chancellor for approval. The only other point which required notice in the new Bill was, that they had retained in the Bill the words of the original Calcutta Bill which was passed to enable that University to confer the degree of Doctor in Law on the Prince of Wales. They had received one criticism on this phrase to the effect that "eminent position" must mean "eminent position in society," whereas they considered that the term would include a person eminent in position as regards literature, science or art; the Committee considered no better term could be found, and the original phraseology was therefore maintained.

The Motion was put and agreed to.

The Hon'ble MR. GIBBS also moved that the Bill as amended be passed.

The Motion was put and agreed to.

AGRICULTURISTS' LOANS BILL.

The Hon'ble SIR STEUART BAYLEY moved for leave to introduce a Bill to amend the law relating to loans of money by the Government to agriculturists. He said that the Act which he was asking the Council to amend was known as the Northern India Takkávi Act. The Act was a very small one; and its whole essence consisted of one section, which said that—

"The Local Government may, from time to time, with the previous sanction of the Governor General in Council, make rules as to loans to be made to owners and occupiers of arable land, for the relief of distress, the purchase of seed or cattle, or any other purpose not specified in the Land Improvement Loans Act, 1883, but connected with agricultural objects."

The loans were to be recovered as arrears of land-revenue. The object of the amending Bill was in the first place to correct a small omission which was made in the original Act. The omission was this, that, although the loans themselves were recoverable as arrears of revenue, no arrangement was made for the recovery of interest on those loans. It was proposed to provide for this. The second point was that the Act, which extends at present only to Northern India, might, at the option of other Local Governments, be extended to the provinces under their jurisdiction. The third point was to provide that loans given on the joint security of village-committees, or to other agricultural

associations of the same kind, might be collected on the joint responsibility in the same way as in the Agricultural Improvement Loans Act. These were all the proposals of the amended Bill, and he now asked leave to introduce it.

The Motion was put and agreed to.

CRIMINAL PROCEDURE CODE, 1882, AMENDMENT BILL.

The Hon'ble MR. ILBERT moved that the Bill to amend the Code of Criminal Procedure, 1882, so far as it relates to the exercise of jurisdiction over European British subjects be referred to a Select Committee consisting of the Hon'ble Mr. Gibbs, the Hon'ble Sir A. Colvin, the Hon'ble Messrs. Evans, Quinton, Gibbon, Miller and Amír Alí and the Mover, with instructions to report in a week. He said:—

"This Bill, in the form in which it is technically before the Council, and apart from the modifications to which I shall refer later on, consists substantially of two enactments, one direct, the other indirect or permissive. The first of these enactments (I refer to them in the order of their importance, not in the order in which they stand in the Bill) declares that every person who occupies the position of District Magistrate or Sessions Judge shall, as such, be qualified to exercise jurisdiction over European British subjects. The second or permissive enactment gives a discretionary power to Local Governments to confer this jurisdiction on such other persons as may be considered fit to exercise it, provided that they have already certain specified powers, and have attained to some one of certain specified ranks in the service. The Bill was framed on the assumption, which I believe to be correct, that the total number of persons whom it would be necessary to invest with these powers would not be large, and that the Local Governments might fairly be trusted to exercise a wise and sound discretion in their selection, but that it might be desirable to confine the range of selection within certain limits. The particular limits suggested were, of course, arbitrary, and were obviously open to further consideration. In so far as they operated to take away the power of appointing unofficial Europeans to be Justices of the Peace, I think that they were defective and required amendment. The Bill did not enlarge in any respect the very limited jurisdiction now exercisable over European British subjects by Magistrates and Courts outside the Presidency-towns, a jurisdiction which may be roughly compared to that exercised in England by Magistrates in petty sessions; and its practical effect has been not unfairly described by saying that it proposed to 'invest a very small number out of the ablest, the most experienced and the most distinguished of our Native Magistrates and Judges with an infinitesimal jurisdiction over European British subjects.'

"Such were the provisions of the Bill as introduced; and, as to its principle, I do not know that I can describe it better than by repeating what I said on a previous occasion, namely, that it aims at the removal of a disqualification based on race, and the substitution of a qualification based on personal fitness. It is not, and was never described by any member of the Government as being, the abolition of race-distinctions for judicial purposes. Such a description would have been obviously inconsistent with the retention of those privileges which Europeans now enjoy, and which we never proposed to take away. Nor, again, is it accurate to say that we have ever announced the policy that race-distinctions in the bestowal of administrative offices shall cease. The Bill would not prevent, and was never intended to prevent, the element of race from being taken into consideration, among other elements, in weighing the qualifications of a Magistrate or Judge. It merely declares that the simple fact of race, or I should be more accurate in saying that the simple fact of not belonging to an artificially defined and circumscribed category of human beings, that this fact, standing alone and apart from all other considerations, shall not constitute an absolute disqualification for the performance of certain important magisterial judicial functions. The argument that race-distinctions rest on certain physical and moral characteristics, and that we can neither create nor remove them by legislation, is really beside the mark. Nobody ever contended that we could. What we do contend is that, in selecting an official to hold a post, to perform duties or to exercise powers, the first thing to look to is his personal fitness; that the fact of belonging or not belonging to a particular race is not conclusive evidence of unfitness; that the line which parts fitness from unfitness does not coincide with the boundary which parts the European British subject from members of a less favoured class; and that, for the purpose of considering whether a man is or is not qualified to be a Justice of the Peace, we ought to be absolved from the necessity of ascertaining whether his parents were or were not lawfully married. In short, the principle of the Bill is the removal not of race-distinctions, but of race-disqualifications, which is a very different matter.

"This, then, was the Bill which was, in pursuance of the Resolution of the 9th of March last, published and circulated in the usual way for the opinions of Local Governments and others. When those opinions were received, it became our duty to consider them, and to see how far it would be possible to give effect to them consistently with our paramount duty of maintaining what His Excellency the Viceroy has referred to as 'the declared policy of the Crown and of Parliament'—the paramount duty of observing what I may describe as the constitutional enactments and constitutional pledges by which we are bound.

"Of those constitutional enactments and pledges, the most important for our present purpose are to be found in the Charter Act of 1833 and in the Queen's Proclamation of 1858. The Charter Act of 1833 enacts that—

'No Native of the said territories' (that is to say, the territories then under the Government of the East India Company) 'nor any natural-born subject of Her Majesty resident therein, shall, by reason only of his religion, place of birth, descent, colour, or any of them, be disabled from holding any place, office or employment under the said Company.'

"And the Queen's Proclamation of the 1st November, 1858, says—

'It is our further will that, so far as may be, our subjects of whatever race and creed be freely and impartially admitted to offices in our service, the duties of which they might be qualified by their education, ability and integrity duly to discharge.'

"Now, I read the second of these two instruments as confirming and supplementing the first. The first removes a legal obstacle by invalidating disqualifications based exclusively on religion, place of birth, descent or colour; the second imposes a positive obligation by directing that, so far as may be, the persons whose disabilities had thus been removed not only may, but shall, be admitted freely and impartially to offices in the public service, subject only to the test of fitness.

"Of course, I do not overlook the force of the qualifying words 'so far as may be.' They justify the Government in declining to apply the general principle laid down by the Proclamation in such a manner, to such an extent, or under such circumstances as might endanger the supremacy of the British Government, impair the efficiency of the administration, or imperil the lives, liberties or property of any class of British subjects. Thus, they are merely a qualification of a general rule: the burden of proof is on those who allege that special circumstances exist which make the general principle inapplicable.

"Now, it is the overlooking of this that appears to me to constitute a weak point in many of the arguments advanced against the Bill. For instance, His Honour the Lieutenant-Governor of Bengal has urged the withdrawal of the Bill 'in the conviction' as he says, 'that it is not necessary for the judicial work of this country.' And the English Judges of the Calcutta High Court, in their very able minute, have argued that, unless we can show that our proposals will tend to make the administration of justice more impartial and effectual than it is at present, the ground is cut from underneath our feet. I believe that our proposals would have that tendency, but it is unnecessary for me to press that point. All that I need say is that the line of argument which I

have indicated appears to me to be based on a misconception of the point of view from which we approached, and from which I contend that we ought to approach, the subject. We start from the assumption, not that legal disabilities ought to be retained until the necessity for removing them has been proved, but that we ought to remove them unless and except so far as their retention is shown to be necessary. And the question which we had to consider in framing the Bill was whether the mode and extent of removal which we proposed would or would not interfere with the effectual and impartial administration of justice.

"Now, I can quite understand the possibility of arguing that the Charter Act or the Queen's Proclamation ought not to be construed or applied in the way in which I have contended that they ought to be construed and applied. What I find much greater difficulty in understanding is how it can be seriously argued that in dealing with the subject we are entitled to disregard these instruments altogether. And yet we have been told on high authority that they have no practical bearing on the question before us. We have been told that the Proclamation has no legal force whatever; that as a ceremonial, it may have been proper; but that, in any other point of view, it is a mere expression of sentiment and opinion, worth as much as the sentiments and opinions expressed would have been without it, and no more. We have also been told that the Charter Act has no force beyond the legal effect of its words; that it has a legal value, but no other value; and that it would be absurd to suppose that Parliament can impose on any one, and in particular that it can impose on any body having legislative power, a moral obligation to take some principle as a guide for legislation, and to embody it in definite enactments from time to time, irrespectively of all other considerations. These statements appear to me to involve a grave misapprehension both as to the constitutional relations between the Government of the United Kingdom and the Government of this great dependency, and as to the principles of construction which ought to be applied to documents of the class to which the Charter Act and the Queen's Proclamation belong. That we have been placed under any obligation, moral or otherwise, to pass any particular enactment at any particular time, irrespectively of all considerations, is what no one has suggested. But I should have thought it was clear beyond all manner of doubt that it is within the competency both of Parliament and of the Crown to indicate in more or less general terms the line of policy which the Government of India is to adopt with respect to any particular subject, and to impose on this Government the obligation of observing that policy. Such an indication of policy is, I take it, to be found both in the Charter Act and in the Queen's Proclamation. Their general effect, as I construe them, is to lay down a clear and distinct principle for the guidance of

this Government, and to leave a wide discretion as to the time, mode and extent of applying that principle.

"And when construing such documents I do not think that we should be justified in explaining or refining them away as a subtle judge or advocate would explain or refine away an inconvenient enactment. On the contrary, our duty is to place on them a broad and liberal interpretation, and to use our best endeavours to ascertain and observe their spirit as well as their letter. Of the Queen's Proclamation I will say nothing, except that, so far from treating it as a mere expression of sentiment and opinion, I regard it as one of the most solemn and formal pledges which was ever given by a ruler to her subjects. About the Charter Act, since its meaning and object have been seriously questioned, it is, I fear, necessary that I should say something more, in order to explain the circumstances under which it was passed, the nature of the policy to which it was intended to give effect, and the mode in which effect has from time to time been given to that policy.

"At the time when the Charter Act of 1833 was passed, the independent British settler, the forerunner of the modern planter, existed only by sufferance in this country. He was regarded as an interloper, and was not allowed to reside in India except under a special license. It was well known that one of the main objects of Lord William Bentinck's policy was to alter this state of things. He was anxious to facilitate the admission of settlers into the interior, to give them the right to settle there, but to couple with that right as a necessary and indispensable condition the liability to be governed by the same laws and to be under the jurisdiction of the same Courts as the Natives of the country. It was in accordance with, and in furtherance of, this policy that the Charter Act of 1833 was passed. As we know, it considerably enlarged the powers of the Governor General in Council for making laws and regulations which were to be binding on all the Courts of the country, but restrained him from making any law or regulation which should empower Courts other than those chartered by the Crown to sentence British subjects or their children to death, or should abolish the Courts so chartered. And it contained the section, which I have already quoted, removing disabilities based on creed or colour.

"Now, this Act was followed by a further despatch from the Court of Directors to the Governor General in Council, explaining very fully the provisions of the measure and conveying orders as to the mode in which effect was to be given to those provisions. The despatch to which I refer is dated the 10th December, 1834, and is of such great importance as a contemporaneous and authoritative exposition of the policy of the Act, and of the way in which it was

intended by its framers that it should be worked, that I shall make no apology for reading to you some of the passages which bear most directly on the position of British-born subjects under the then new law.

'58. With regard to British-born subjects,' says the despatch, 'when the Act says that you shall not pass laws making them capitally punishable otherwise than by the King's Courts, it does by irresistible implication authorise you to subject them in all other criminal respects, and in all civil respects whatever, to the ordinary tribunals of the country. We know not indeed, that there is any crime for which under this clause they may not be made amenable to the country tribunals, provided that the law, in giving those tribunals jurisdiction over the crime, shall empower them to award to it some other punishment than death.

'59. From these premises there are some practical inferences to which we must call your attention. First, we are decidedly of opinion that all British-born subjects throughout India should forthwith be subjected to the same tribunals with the Natives. It is, of course, implied in this proposition that, in the interior, they shall be subjected to the Mufassal Courts. So long as Europeans penetrating into the interior held their places purely by the tenure of sufferance, and bore in some sense the character of delegates from a Foreign power, there might be some reason for exempting them from the authority of those judicatures to which the great body of the inhabitants were subservient. But now that they are become inhabitants of India, they must share in the judicial habitudes as well as in the civil rights pertaining to that capacity, and we conceive that their participation in both should commence at the same moment.

'60. It is not merely on principle that we arrive at this conclusion. The 85th clause of the Act to which we have before referred, after reciting that the removal of restrictions of the intercourse of Europeans with the country will render it necessary to provide against any mischiefs or dangers that may thence arise, proceeds to direct that you shall make laws for the protection of the Natives from insult and outrage, an obligation which in our view you cannot possibly fulfil unless you render both Natives and Europeans responsible to the same judicial control. There can be no equality of protection where justice is not equally and on equal terms accessible to all.'

"And then in some later paragraphs the despatch goes on to comment on section 87, the section relating to race-disabilities, and what it says about that section is this:—

'103. By clause 87 of the Act it is provided that no person, by reason of his birth, creed or colour, shall be disqualified from holding any office in our service.

'104. It is fitting that this important enactment should be understood, in order that its full spirit and intention may be transfused through our whole system of administration.

'105. You will observe that its object is not to ascertain qualification, but to remove disqualification. It does not break down or derange the scheme of our Government as conducted principally through the instrumentality of our regular servants, civil and military. To do this would be to abolish or impair the rules which the Legislature has established for securing

the fitness of the functionaries in whose hands the main duties of Indian administration are to be reposed—rules to which the present Act makes a material addition in the provisions relating to the College at Haileybury. But the meaning of the enactment we take to be that there shall be no governing caste in British India; that whatever tests of qualification may be adopted, distinctions of race or religion shall not be of the number; that no subject of the King, whether of Indian or British or mixed descent, shall be excluded either from the posts usually conferred on our uncovenanted servants in India, or from the Covenanted Service itself, provided he be otherwise eligible consistently with the rules, and agreeably to the conditions, observed and enacted in the one case and in the other.

'106. In the application of this principle, that which will chiefly fall to your share will be the employment of Natives, whether of the whole or the mixed blood, in official situations. So far as respects the former class, we mean Natives of the whole blood, it is hardly necessary to say that the purposes of the Legislature have in a considerable degree been anticipated. You well know, and indeed have in some important respects carried into effect, our desire that Natives should be admittted to places of trust as freely and extensively as a regard for the due discharge of the functions attached to such places will permit. Even judicial duties of magnitude and importance are now confided to their hands, partly no doubt from considerations of economy, but partly also on the principles of a liberal and comprehensive policy. Still a line of demarcation, to some extent in favour of the Natives, to some extent in exclusion of them, has been maintained. Certain offices are appropriated to them; from certain others they are debarred; not because these latter belong to the Covenanted Service and the former do not belong it; but professedly on the ground that the average amount of Native qualifications can be presumed to arise to a certain limit. It is this line of demarcation which the present enactment obliterates, or rather, for which it substitutes another wholly irrespective of the distinction of races. Fitness is henceforth to be the criterion of eligibility.'

"Here, then, was a sufficiently clear and distinct enunciation of the general policy which the Government of India was expected and intended to follow. On the successive steps which have been taken from time to time to give effect to that policy, I must touch very briefly. The first of those steps was the passing of Lord Macaulay's famous Black Act of 1836. With the circumstances that attended the introduction and passing of that Act all the readers of Macaulay's life are familiar. The controversy which raged around the measure resembled in many of its features the controversy which has raged around the present Bill, and particularly in the predictions which were then so confidently made, and which have been so signally falsified by the event, that, if the measure became law, India would be deserted by British capital. Lord Macaulay's Act has now for nearly 40 years maintained a peaceful and useful existence on our Statute-book, and I am not aware that a single British planter or merchant is a penny the worse for its existence.

"Lord Macaulay's measure applied only to the Civil Courts. But he left on record an opinion that similar legislation ought to be applied to the Crimi-

nal Courts, and in 1843 the Indian Law Commissioners submitted proposals for this purpose. These proposals were considered and commented on by the Judges of the Supreme Court and others, but no steps were taken to give legislative effect to them until 1849. In that year, Mr. Drinkwater Bethune, who was then Legal Member of Council, prepared and published with Lord Dalhousie's assent the drafts of three Bills, one of which proposed to make all persons amenable to the criminal jurisdiction of the Company's Magistrates and Courts outside the Presidency-towns, subject only to the reservation that no such Magistrates or Courts should have power to pass a sentence of death on any of Her Majesty's subjects born in England, or on the children of such subjects. There was no restriction of this jurisdiction to Justices of the Peace. The three Bills met with much opposition, and were eventually withdrawn, for reasons explained by Lord Dalhousie in a minute from which I will quote.

'I am most clearly of opinion,' he says in his minute of 19th April, 1850, 'that the time has come when the exemption in question ought to be abolished, and that British subjects should now be brought within the jurisdiction of Criminal Courts in the Mufassal, as they have long since been brought under the jurisdiction of the Civil Courts there. But, after an anxious examination of the subject, I must declare that I am not prepared to place the British subject under the criminal law which is now administered in those Courts, or to deprive him of his privilege of being judged by English law' (not, mark, English Judges) 'until we can place him under a criminal law equally good, or at all events as good as the circumstances of India will admit of. This is very far from being the case at present. The criminal law administered in the Mufassal is in substance the Muhammadan law, modified from time to time by the Regulations and expounded by the decisions of the Sudder Court.'

"Accordingly, he urges the great importance of pressing on the completion and passing of the Penal Code with such amendments as should be found necessary.

'I cannot,' he says, 'conceive it probable that a Code prepared by men so eminent, judged and approved by so many men of learning and experience, should appear to the Legislative Council so bad in itself, and so incapable of amendment, that they should advise its rejection altogether. If such, however, should be the case, the responsibility of the Governor General and the Legislative Council will be at an end. We have proclaimed to all India by the publication of the draft Acts that it is our conviction that British subjects should be placed within the jurisdiction of the Mufassal Courts, and that we have resolved so to enact. We cannot, without discredit and loss of public confidence and respect, abandon that resolution; we ought not to abandon it. There is no discredit in delaying the passing of the Act for the purpose of providing any possible guarantee by the enactment of a fitting criminal law for the liberty and property of British subjects when placed under the operation of the Act. But we must not, by relinquishing our intentions, give others reason to believe that we have been scared from our right determination by public outcry, still less that we may have allowed ourselves to be driven

from the enforcement of our conscientious conviction of what is right and necessary by difficulties which we encountered in the way. The establishment of the same criminal law generally in the Indian Empire is a wholesome measure, and it must now be accomplished.'

"In 1853, the Charter of 1833 was renewed, and by the Statute passed for that purpose Her Majesty was empowered to appoint in England a new Commission to revise the work of the former Indian Law Commissioners; and to this body the Penal Code and the question of a Criminal Procedure Code, which had been so long pending, were referred. The Commissioners accordingly prepared a draft which eventually, and after undergoing various modifications, became law as the Criminal Procedure Code of 1861, and as the basis of our existing Criminal Procedure Code. By section 5 of this draft it was proposed to enact that—

'No person whatever shall by reason of place of birth or by reason of descent be in any criminal proceedings whatever excepted from the jurisdiction of any of the Criminal Courts.'

"In fact, to apply to the Criminal Courts the enactment which Lord Macaulay had applied to the Civil Courts. The Commissioners said in their notes:—

'We assumed that the special privileges now enjoyed by European British subjects were to be abolished. In the system which we propose, all classes of the community will be equally amenable to the Criminal Courts of the interior.'

"They proposed, however, to give the High Court and Sessions Court exclusive jurisdiction (1) in offences reserved in the schedule of offences appended to the Bill as triable only by such Courts; (2) in theft and receiving when the property was worth over Rs. 500; and (3) in all cases against public servants of certain classes. This last exemption, making a distinction in favour of the official classes, was obviously a weak point in the Commissioners' proposals, and was made the subject of the most effective attacks which were directed against them in the subsequent debates in the Legislative Council.

"These debates, which took place in the years 1857, 1859, and 1861, have already been referred to by my hon'ble friend Mr. Evans and others, and I should not be justified in occupying your time by dwelling further upon them. Suffice it to say, that they were interrupted by the Mutiny; that, although Sir Barnes Peacock in introducing the Bill supported the principle of the section which I have quoted, and said he could not understand on what grounds it could be contended that any one class of persons should be exempt from the jurisdiction of any of the Courts of the country, yet after the Mutiny he saw cause to change his mind. The Code as it finally passed in 1861 left matters relating to the jurisdiction over European British subjects very

much as they were before, except that it restricted the jurisdiction then exercised in certain cases over European British subjects in the interior by Native Magistrates and others not being Justices of the Peace. Such was the conclusion arrived at in 1861, and under the circumstances of the case, when the terrible events of the Mutiny were still fresh in men's memories, when it yet remained to be seen what would be the effect of introducing English substantive law and English rules of procedure into the Criminal Courts of the interior, I do not say that it was an unreasonable, and it certainly was a very intelligible, decision.

"The Penal Code had become law in the previous year as Act XLV of 1860, and, by the enactment of this Code and of the Procedure Code of 1861, the most forcible of the objections which had on previous occasions been urged against extending the criminal jurisdiction of Courts in the interior over European British subjects, the one objection to which Lord Dalhousie attached weight, was removed in the way in which Lord Dalhousie had contended that it ought to be removed.

"The Code of 1861 was amended in various ways by Acts passed in 1861, 1862, 1866, and 1869, and it was clear that it was susceptible of considerable improvement. Accordingly, the Secretary of State in 1869 referred the condition of the Code and its revision to the Law Commissioners at home, and they reported in favour of bringing all classes of persons under its provisions. This, of course, was tantamount to a recommendation that European British subjects should be brought under the jurisdiction of the Criminal Courts of the interior, to which alone the Criminal Procedure Code then applied.

"The report to which I have referred was made in 1870, and in the same year Sir James Stephen revised and re-arranged the Code of 1861, and introduced the measure which subsequently became law as the Code of 1872. The Bill, as first introduced, did not substantially affect the jurisdiction over European British subjects, and it was only at a later stage that the amendments were introduced by which it was proposed to extend the powers of Criminal Courts in the interior over that class of Her Majesty's subjects. And it was in connexion with this proposal that the compromise, to which so much reference has been made, was entered into. There is nothing on record to show the persons with whom, or the manner in which, the compromise was arrived at, but I have no doubt that the accounts of it which have been since given by Sir James Stephen, Mr. Evans and others are substantially accurate. It appears to have been some kind of informal arrangement or understanding to

which at least some members of the Select Committee on the Bill were parties. Two things are clear about it, first, that it was not regarded as binding on the Select Committee as a whole, because one of the members of that Committee voted against the proposals which it embodied, and secondly, that the Executive Government were not a party to it, because the majority of them voted against the proposal. But I need hardly say that, even if the agreement had been as formal as it was informal, it would not have tied the hands of subsequent Governments or have prevented them from passing such enactments as might from time to time be required in the interests of justice, good administration, and sound policy.

"Now, to a compromise, as such, in a matter of this kind, I have no manner of objection. It is reasonable enough in legislation, as in other matters, when you can't get all that you wish, to take what you can get and make the best of it. The main question is whether and how far the particular compromise arrived at is likely to produce inconvenient consequences hereafter, either by abandoning a principle which ought to be maintained or in any other way. And, looked at from this point of view, the compromise of 1872 does appear to me to have been open to somewhat serious objections. I don't say this for the purpose of condemning the compromise, which was, as Sir John Strachey frankly admitted, open to criticisms of every kind, but for the adoption of which at that particular time there may have been strong reasons of a practical nature. But I say it rather for the purpose of showing how difficult it is to make any arrangement on a subject of this kind to which valid objections cannot be taken.

"The chief objections to which the arrangement of 1872 appear to me to have been open are three. First, that, although put forward as a compromise, an attempt was made to defend it on principle, and that the arguments by which it was so defended are unsound and fallacious. Secondly, because the form which the compromise assumed, and the grounds on which it was supported, were not wholly consistent with the principles in accordance with which we are bound to govern India. Thirdly, that it contained the seeds of practical difficulties which were certain to mature at no very distant date.

"One of the main arguments by which the compromise was supported was that in this country, as distinguished from England, personal, as opposed to territorial, laws prevail on all sorts of subjects, and that their maintenance is insisted on with the utmost pertinacity by those who are subject to them. The Muhammadan, it was said, has his personal laws, and the Hindú his. Now, it is perfectly true that we have undertaken to apply the rules of

Muhammadan or Hindú law, as the case may be, to questions regarding succession, inheritance, or marriage or caste, or any religious usage or institution. But have we ever undertaken that a Muhammadan shall be tried by a Muhammadan or a Hindú by a Hindú? And, if not, how can the argument be used to justify the disqualification of a Native for exercising jurisdiction over an Englishman?

"The whole of the argument sounds to me very much like the echo of a past controversy. There had been, not many years before 1872, a time when the Englishman and the Native of India were under different systems of criminal law, owing to the fact that the criminal law administered in the Courts of the Presidency-towns was English law, whilst the criminal law administered in the Courts of the interior was in the main Muhammadan law; and, when this was the case, the Englishman might very reasonably object, and did object with great vigour, to being placed under a criminal law which was not his own. But the Penal Code of 1860 and the Criminal Procedure Code of 1861 had effaced, and it was their main object to efface, these distinctions, and by the passing of these Codes the argument based on difference of laws was deprived of all its significance.

"Very similar considerations apply to an argument which, if I remember rightly, was not used in 1872, but on which a good deal of stress has been placed since—the argument based on the fact that special tribunals for Europeans exist in countries such as Turkey, Egypt, China, and Japan. It is perfectly true that such tribunals do exist, and that we reserve to them jurisdiction over our fellow-subjects. But why? Because, with all the respect that is due to the Governments of those countries, we have not as yet sufficient confidence in their system of administration to place complete reliance on their judicial officers, who are neither appointed, removed, nor controlled by us, and because the criminal law and the criminal procedure which they administer are not in accordance with the principles observed in English Courts of law. But does any one of these considerations apply to those of Her Majesty's Courts which are presided over by Natives of India? The Judges are appointed by us; they are removable by us; their proceedings are subject to our control and supervision in the minutest particulars; the law which they administer is not Foreign law, but English law; and the Codes in which the law is embodied are the work of English lawyers, and are, to quote Lord Dalhousie's language, founded on the principles and instinct with the spirit of the common law of England.

"I have said that the general line of argument by which the 1872 compromise was supported does not appear to me to be wholly consistent with the principles which are laid down in the Act of 1833, and which I hold that we

are bound to maintain. Do not let me be misunderstood on this point. I do not mean to suggest that there is any technical inconsistency between anything contained in the Charter Act and the Queen's Proclamation on the one hand, and any of the provisions of the Criminal Procedure Code on the other hand. If there had been any such inconsistency, of course the latter provisions would not have been allowed to become law. But I do say that the framers of the 1872 Code sailed near the wind. To disable a man on grounds of race from performing an important part of the duties ordinarily attached to an office approaches perilously near to debarring him from holding the office, and certainly places great practical difficulties in the way of his admission to the office.

"Observe that up to 1872 the controversy had been, not whether a European British subject should be triable by a Judge of a particular race, but whether he should be triable by a particular class of Courts—the Courts of the interior—as distinguished from the Courts of the Presidency-towns; that the question of race, when it arose at all, only arose incidentally, and that it was only by indirect means that the jurisdiction of Natives over European British subjects was either limited or excluded. The legislation of 1872 gave jurisdiction to the country Courts, but expressly took it away from the Native Judges of those Courts as Natives. It removed the line by which jurisdiction over European British subjects had previously been limited, and drew it between other points. And in so doing it seems to me to have drawn the line precisely at the place where the authors of the Act of 1833 intended that it should not be drawn, and to have emphasized and accentuated the race-disabilities which it was the object of the Charter Act to remove.

"One of the most unfortunate results of the particular form which the compromise of 1872 assumed, and of the particular arguments by which it was defended, was that it attached, or at least materially helped in attaching, an entirely new meaning to that well-worn phrase, the right to trial by peers. We have been repeatedly informed that the Englishman enjoys an undeniable and indefeasible right to be tried by a Judge or Magistrate of his own race, and that this is what is meant by the right to trial by peers which is supposed to be guaranteed by Magna Charta. Now, I do not propose to discuss the precise meaning of the famous passage which declares that no free man is to be imprisoned, and so forth, *nisi per legale judicium parium suorum vel per legem terræ*. Those who are curious on the subject cannot do better than turn to the very instructive passage in Sir James Stephen's History of the Criminal Law of England, in which he argues that the right to trial by peers was confined to that limited class of persons who

were vassals of the King's Courts, and that the only right which was guaranteed to ordinary free Englishmen was the right to trial by the law of the land, that is to say, by the ordinary course of justice. If I were disposed to approach the subject merely from an antiquarian point of view, I might say with perfect accuracy that Magna Charta has as much to do with the Bill now before us as Domesday Book has to do with the Permanent Settlement. But I do not think that great constitutional enactments such as Magna Charta, and, I may add, the Charter Act of 1833, ought to be dealt with in any such spirit. What is more to the purpose is to ascertain how they have in practice been understood and acted upon.

"It has been confidently asserted, and I find the assertion repeated over and over again in the papers relating to the Bill, that as a matter of law an Englishman has a constitutional right to be tried in criminal matters by a Judge of his own race, and that as a matter of fact this right has always been enjoyed by Englishmen settled in India. Now, I must take leave to deny both these propositions.

"As to the argument based on constitutional right, it seems to be a plant of very recent growth even in India, for in the earlier stages of the controversy the right which was supposed to be guaranteed by Magna Charta and to be affected by such measures as those prepared by Mr. Drinkwater Bethune, was this right to trial by jury, which is a very different thing.

"And outside India, in other parts of the world inhabited by men of English race or descent, I am not aware that this argument is ever used or recognized. I have made some inquiries on the subject, and I find that in no British colony is there any distinction between Europeans and Natives with respect to the jurisdiction exerciseable over European British subjects, or persons belonging to any similar class. There is the same law for both Europeans and Native, and if a Native is appointed to administer the law, he has exactly the same amount of jurisdiction as a European. For instance, in the neighbouring island of Ceylon, where, as in India, we have English settlers in the midst of a Native population, there are Native judicial officers qualified to exercise, and exercising, criminal jurisdiction over European British subjects. And in the colony of Hongkong I am told that there is at least one Chinaman who has acted successfully as a Magistrate.

"That is how the matter stands outside India, and in India itself it would be easy to disprove the assertion that European British subjects have never been subject to Native criminal jurisdiction in places outside the Presi-

dency-towns. But in order to do this fully it would be necessary to refer to a good many Acts and Regulations with which I do not propose to weary you. Inside the Presidency-towns, Magistrates and Judges have never been subject to any disqualification or disability, and Natives of the country have always been eligible to be appointed, and have been freely appointed, Justices of the Peace and Presidency Magistrates with jurisdiction over European British subjects as well as over others. So that this new-fangled theory about the meaning of trial by jury squares neither with the law nor with the facts, and I cannot help thinking that the arguments by which the 1872 compromise was helped out were mainly responsible for its invention.

"And, lastly, it appears to me that the particular compromise then entered into contained within itself the seed of future difficulties, which has since borne fruit. It is perfectly true that, if the proposal to confer jurisdiction on District Magistrates and Sessions Judges as such, the proposal which was lost by so narrow a majority, it is true that, if this proposal had been carried, its immediate practical effect would have been *nil*, because, as my hon'ble friend Mr. Hunter has pointed out, at the time when the Code of 1872 became law, there were only four Native members of the Civil Service, none of whom had risen to the post of District Magistrate or Sessions Judge, and three of whom were youths of a few months' standing. But there were such men in the service, Natives of India who had entered the service under the Statute which had founded the competitive system. Another Statute had been passed for the express purpose of admitting Natives of India to posts which had been previously confined by law to the Covenanted Civil Service, and it was well known to be the settled policy of the Government of India to encourage and facilitate the admission of Natives of India to such posts. Under these Statutes, and in pursuance of this policy, the numbers of the Native members of the service has since 1872 increased from 4 to 33, and some of them have already attained to the rank of District Magistrate and Sessions Judge. Thus, the question which might in 1872 have been shelved as being of mere theoretical importance, has now, to quote again Mr. Hunter's language, 'acquired present and practical bearing.'

"Another circumstance has taken place since 1872 which has a direct bearing on this question, and it is a circumstance immediately connected with the passing of the Code of 1882. Before that year the criminal procedure of the Courts in the Presidency-towns and the criminal procedure of the Courts outside those towns were regulated by different Acts or sets of Acts. There were the High Court Criminal Procedure Act and the Presi-

dency Magistrates Act, applying exclusively to the Courts in the Presidency-towns (or almost exclusively, for the High Court at Allahabad was an exception), and there was the Criminal Procedure Code, applying exclusively to the Courts outside these towns. In the former of these Acts there was no trace or vestige of any race disability, for a High Court Judge or a Presidency Magistrate, whatever may be his race, whether he is a European British subject or not, has jurisdiction over European British subjects. Whilst in the Criminal Procedure Code there was the marked and stringent exclusion of Natives of India as such from exercising this jurisdiction.

"Now, it was felt at the time when the last Code was under discussion that the old distinction between the Presidency-towns and the Mufassal, the distinction which plays so important a part in the earlier days of British Indian history, had to a great extent disappeared, and that the system of criminal procedure obtaining in all the Criminal Courts of the country could with advantage be brought under, and regulated by, one and the same law. Accordingly, the two sets of Acts, the Acts which ignored the race-disability, and the Acts which maintained them, were brought together. The High Court Procedure Act and Presidency Magistrates Act were repealed, and the new Criminal Procedure Code was applied to the Presidency-towns as well as to the Mufassal. This process naturally brought into still greater prominence what Sir Ashley Eden described as an anomaly, and made it only natural to inquire, whether, when other distinctions between town and Mufassal were being removed, this distinction should not be removed also, and whether the rule of giving powers according to personal fitness should not be applied to all parts of the country.

"This was the rule which we sought to apply by the Bill which was introduced last February. We sought to apply the principles laid down by the Charter Act and Queen's Proclamation, by removing, so far as existing circumstances would admit, the distinction drawn by the Code of 1872 between European and Native Magistrates and Judges with respect to their powers over European British subjects. And we sought to apply those principles in the most cautious and guarded manner. The Bill has been written and spoken about as if it had proposed to confer on every Native Magistrate and Judge unlimited powers over every British subject, and much of the language used about the measure is intelligible on no other hypothesis. Nothing can be further from the truth. The power to be conferred was of the most limited extent, and was so fenced and hedged about by numerous restrictions in the form of powers of control, powers of supervision, powers of transfer, rights of appeal, and the like, as to render any risk of

injustice practically impossible. Nor were the powers to be conferred on all Magistrates and Judges. The Bill proposed to confer them absolutely on District Magistrates and Sessions Judges only, but it empowered Local Governments in their discretion to extend the powers to other officials belonging to certain specified classes. It thus gave to a sound principle a limited application in the first instance, and provided for its gradual extension if and as its extension should be found practicable or desirable.

"However, when the opinions on the Bill came in, we found that on the one hand fears were expressed lest the discretionary powers which we proposed to give Local Governments should be unwisely and lavishly exercised, and that on the other hand the majority of Local Governments would be unwilling to exercise them at all. Under these circumstances, we came to the conclusion that it would be better to drop a provision which had excited unnecessary apprehensions, and which was likely to remain for some time a dead-letter. By so doing we gave up the attempt to apply the principle of selection by fitness in the precise manner and to the precise extent which we had originally contemplated, but we did enough to meet the immediate necessities of the case, and to maintain a principle which had been directly attacked and which it was our duty to uphold. The Bill as thus modified would enable us to give effect to the suggestion out of which these legislative proposals originated, namely, that when Native officials had risen to high and responsible posts in the public service they ought to be given equal power with their English colleagues of the same rank, and it would maintain the principle that, where personal fitness had been established, race ought not to operate as a disqualification.

"And the test of fitness which it would impose is a test to which no reasonable person could object on the ground of insufficiency. For to say that a Native of India who has been entrusted with the powers exercisable by a District Magistrate or Sessions Judge, who has risen to the position of being the chief executive officer or the chief judicial officer in an area the average population of which in Bengal is about a million and a half, to say that such a person cannot be trusted to exercise with justice and discretion the very limited jurisdiction which is exercisable over European British subjects outside the Presidency-towns, is to say that no Native of India, however long and complete may have been his training and experience, however high and responsible may be his position in the public service, is fit to exercise that jurisdiction. And that is a proposition which few will be bold enough to maintain.

"This, then, was the form to which, in deference to expressions of opinion to which we had undertaken and were bound to give the fullest consideration,

we were prepared to reduce a measure originally limited in its scope. And we were prepared to furnish an additional safeguard against the possibility of any risk of injustice by increasing the facilities already provided by the law for obtaining a transfer of the proceedings, or, as it would be called in England, a change of venue, in any case where such a transfer might appear to be desirable in the interests of justice. The provisions suggested for that purpose by the Chief Justice of Madras would be available for all persons, Europeans and Natives alike.

"Such were the modifications which, as has been already announced by His Excellency the Viceroy, we were and are prepared to recommend for adoption by the Select Commitee to which this Bill is to be referred. However, since that announcement was made, it has been strongly pressed upon us by persons whose opinion is entitled to great weight that, however moderate and cautious our proposals might be, yet there was a certain risk of an explosion of race-feeling taking place when the new law came to be put into force. And however much we might deplore and condemn the spirit which renders such a risk possible, yet we felt it to be our duty to minimise that risk by any means which might appear to be practicable and justifiable. Accordingly, we have agreed to accept a suggestion which has been made to us with this view, and which would have the effect of slightly extending the system of trial by jury. The suggestion is that a European British subject, when brought for trial before a District Magistrate or Sessions Judge, should have the right, if he thinks fit to claim it, to be tried by a jury, such as is provided for by section 451 of the Criminal Procedure Code, subject to two conditions—first, that no distinction is to be made between European British Magistrates and Judges, and secondly, that the punitory powers of District Magistrates over European British subjects are to be doubled, that is to say, are to be extended to imprisonment for six months or a fine of two thousand rupees. The punitory power of other Magistrates, that is to say, the power to imprison for three months or impose a fine of one thousand rupees, will be left untouched, and in cases tried before them the right to a jury will not be given.

"The adoption of this suggestion will maintain a complete equality between European and Indian District Magistrates and Sessions Judges, and may at the same time provide in certain cases a useful safety-valve against such a risk as that to which I have referred.

"The practical effect of adopting the suggestions will, I believe, be slight. As to trials before District Magistrates, two things must be borne in mind; first, that the total number of criminal charges against European British

subjects in the Mufassal is small, and secondly, that the total number of cases of any kind tried by District Magistrates is very small indeed. From these two premises it is not difficult to draw a conclusion. As regards trials before Sessions Judges, it will be remembered that all such trials must under the existing law be either by jury or with the aid of assessors; that any Local Government may by executive order direct that the trial of all offences, or of any particular class of offences, before a Sessions Judge shall be by jury; and that such orders have been applied to many parts of India, including some of the most important districts of Bengal and the whole of Assam.

"The question as to the merits or demerits of the system of trial by jury whether generally or as applied to British India is a large question into which it is not necessary for me to enter now. Whatever is to be said for or against the system, it must be admitted that it already exists in British India—that it is an institution to which Englishmen are by long custom and not without good reason attached, and of which no Government would wish to deprive them without strong and sufficient cause. But I need hardly say that its maintenance, either in its existing form or with the extension which we propose to give it, is dependent on the assumption that it is capable of being so worked as not to cause any failure of justice or other grave evil, and that an instrument of justice which is intended and ought to be a terror, will not be converted into a source of impunity to evil-doers.

"And this leads me to say one word in conclusion about a subject to which frequent reference has been made in connexion with this measure. I mean the necessity of maintaining what is called prestige. This is not the time nor the place for discussing the '*arcana imperii*,' and I do not propose to inquire in what sense it is true that British supremacy in India was obtained by, or rests on, the sword. I believe that in a far truer sense our empire is an empire of law. 'The secret of our strength in India,' it has been well said, 'is that we have endeavoured truly and indifferently to do justice, according to the best of our skill and understanding, to all sorts and conditions of men.' It is not on the enjoyment of legal privileges that British authority in India rests: it is not by the removal of such privileges that British authority will be affected. What will affect it will be anything which weakens the conviction that we are resolved and able to administer equal and impartial justice for the benefit of and against all classes of Her Majesty's subjects."

The Hon'ble MR. HUNTER said:—"My Lord, I understand that in voting for the Motion now before the Council, hon'ble members express at this stage

their approval of the general principle affirmed by the Bill. The important amendments which have just been indicated in the speech of my hon'ble and learned friend, are not yet before the Council in a substantive form. With regard to them, therefore, I shall make only two observations at present. On the one hand, I acknowledge that, as a whole, they will render the Bill a more acceptable measure. On the other hand, I deeply regret that one of those amendments, by extending to European British subjects, and to them alone, the jury-system in trials before Magistrates, gives a fresh recognition to race-distinctions in matters of judicial procedure. But the question immediately before those members who agree with me on the main issue, is not whether they dislike the proposed amendments, or how far they think them capable of improvement by the Select Committee, but whether the proposals are of such a character as to justify them in withholding their vote from the general principle affirmed by the Bill as it lies on the table to-day. In my judgment the proposed amendments do not justify that course; and I observe that influential organs of Native opinion recognise the mistake which that course would involve. My hon'ble friend, Mr. Amír Alí, will doubtless acquaint the Council with the views of the Muhammadan community in this matter. Among other less homogeneous sections of the Indian races, opinion has scarcely yet matured, but I believe that the view which will ultimately prevail is that arrived at by the *Indian Spectator*, the leading Native newspaper in Bombay—

'Those of our countrymen,' says this Native journalist in his last issue, 'who will calmly survey in all its bearings the present aspect of the controversy, will, we are sure, find fair cause for congratulation in the settlement of this needlessly prolonged discussion. * * * District Magistrates and Sessions Judges, Europeans and Natives alike, are now on a par as to criminal jurisdiction. This substantive grievance has at last been redressed.'

"The last sentence expresses my own view. In 1872, this Council, in the absence of any representative of either the Hindu or the Muhammadan community, affirmed by a very narrow majority, a distinction based upon race, between judicial officers belonging to the same service—officers filling the same appointments, and exercising in all other respects the same jurisdiction. I hope that to-day the Council will, without a division or by a large majority, affirm the opposite principle. I do not disguise, and I do not underrate, the importance of the concession by which alone that unanimity could have been attained. But I think that the public agitations and painful personal estrangements of the past year will not have been encountered in vain, if the Council affirms by its vote to-day that the European and Native servants of the Crown in India, holding the important offices of District Magistrate and Sessions Judge, shall henceforth exercise the jurisdiction pertaining to their office without distinctions between them based on race or creed. Such an affirmation

will be in strict accordance with the Queen's Proclamation when Her Majesty assumed the government of India. The intention of that Proclamation has always seemed to me to be as clear as simple and noble words can make it. But doubts have lately been expressed as to its binding effect. The present Bill will set at rest those doubts, so far as concerns the impartial admission of Her Majesty's Indian subjects, irrespective of colour or creed, to discharge the duties of offices to which they have been duly appointed, and which they are admitted, apart from race-distinctions, to be admirably fitted to fill."

The Hon'ble MR. AMÍR ALÍ said:—"My Lord, I wish to make a few remarks on the Motion before the Council, as I feel it will not be right on my part to give a silent vote upon it without explaining to some extent my own views and the views of my community with regard to this measure. We have been for some months past living in an atmosphere of misconception. People who at any other time would have been most unwilling to impute improper motives to their worst enemies have not hesitated to accuse of dishonesty every individual who happened to disagree with them in respect of the merits of the measure in question; and, though the controversy has now assumed a new phase, the uncharitableness which has hitherto characterised the discussions has, I fear, not quite ceased yet. I may, therefore, be allowed to state that the views which I entertain on this subject, and which I take this opportunity of expressing in Council, are not the result of anything that has transpired within the last twelve months, formed in the heat of controversy and likely therefore to be biassed. My Lord, those views were first placed before Government in the year 1879. I was holding then the office of Chief Magistrate of Calcutta, and in that capacity my opinion was asked by Lord Lytton's Government upon the Bill which now forms the Code of Criminal Procedure. I ventured to point out then, what I have repeatedly urged since, that the invidious distinction created by the disability clauses of the Code, so far as they affected the higher judicial offices, was a mistake both from an administrative as well as a political point of view; and though, at that time, as far as I know, there was no non-European District Magistrate or Sessions Judge, yet it seemed to me that the time was not far distant when there would be several such officers, and that it would give rise to considerable inconvenience if the disability clauses were allowed to remain unmodified on the Statute-book. My Lord, the difficulty which I apprehended in 1879 clearly made itself felt in 1883—sufficiently clearly to induce the Government, acting in conformity with the principles laid down by a succession of Viceroys and Secretaries of State, to bring in a Bill to remove, within a very limited extent, the disabilities under which non-European officers laboured, and to place them, for certain purposes, on a footing of equality with

their European fellow-officers. This measure gave rise to a most vehement opposition on the part of the Anglo-Indian community. Nobody, as far as I know, in our community quarrels with them for their opposition, but we cannot help regretting that men who ought to have known better, and who certainly owed some gratitude to the people of India, should so far forget themselves as to indulge in language alike discreditable to themselves and their community, and which had the effect of converting this legal controversy into a race-difficulty. So far as we were concerned, we hailed with satisfaction the introduction of this measure as the first *bonâ fide* endeavour on the part of the British Government to give practical effect to the policy and principle enunciated in 1833, and emphatically re-affirmed by Her Majesty in Her Proclamation. It will, I hope, not be considered inappropriate by the Council if I say here that I read with considerable surprise the other day that, in Sir Fitzjames Stephen's opinion, the Queen's Proclamation 'was a mere expression of sentiment and opinion,' and nothing more. It is somewhat strange that a writer of his eminent ability should stoop, however unconsciously, to such a misrepresentation regarding the character of this great public document, when Her Majesty's own words are on record to falsify the assertion. Mr. Theodore Martin gives the history of the Proclamation in the following words :—

'The Act for the better Government of India had become law on the 2nd of this month (August 1858), and the Proclamation had to be settled, which was forthwith to be issued by the Queen in Council, setting forth the principles on which the government of that country was for the future to be conducted. The draft of this document was transmitted from England to Lord Malmesbury, the Minister in attendance on Her Majesty, and laid by him before Her upon the 14th. It did not seem to the Queen to be conceived in a spirit, or clothed in language, appropriate to a State paper of such great importance."

"And then follows Her Majesty's letter to Lord Derby, conveying Her instructions for the preparation of the Proclamation :—

'The Queen has asked Lord Malmesbury to explain in detail to Lord Derby her objections to the draft of the Proclamation for India. The Queen would be glad if Lord Derby would write it himself in his excellent language, bearing in mind that it is a female Sovereign who speaks to more than a hundred millions of Eastern people on assuming the direct government over them, and after a bloody civil war, *giving them pledges which her future reign is to redeem, and explaining the principles of her Government.* Such a document should breathe feelings of generosity, benevolence and religious toleration, and point out *the privileges which the Indians will receive on being placed on an equality with the subjects of the British Crown,* and the prosperity following in the train of civilization.'

"These words of Her Majesty leave no possible room for doubt as to the character of the pledges given by her to her Indian subjects. The further re-

mark of Sir Fitzjames Stephen, that the Proclamation has no legal force whatever, may be technically correct from the standpoint of a *special pleader*; but it must be remembered that that it was a solemn Act of State, prepared by Her Majesty's Government, guaranteeing in the most formal manner the rights and privileges of the people of India upon the same basis as those of Her Majesty's British subjects, and it will require greater casuistry than ever Sir Fitzjames Stephen can bring to bear on the subject before the people of India will be convinced that Her Majesty's solemn words have no legal value or force when the rights of the different communities subject to her sway are weighed in the scales of justice. My Lord, it has been urged by some people that the measure in question would have had the effect of depriving European British subjects of a cherished privilege to be tried by their peers. I may be allowed to say that no person —certainly no person who is not an Englishman—can be more anxious than I am to see Her Majesty's European British subjects secure in the enjoyment of any legislative privilege which they possess, and which does not conflict with the just interests of Her Majesty's other subjects. It seems to me, however, that the argument to which I have referred is based on a misconception. If people will insist on looking at a thing upside down, it must necessarily appear wrong. Such seems to me to be the view entertained by those people who consider that the effect of this measure would be to deprive European British subjects of a privilege which they now possess. Your Lordship's Government did not propose to take away any privilege from the European British subject, or to lower their status in any shape or degree. What the Government proposed to do was to raise the status of a few specially qualified officers, whom the Local Governments thought were fitted to hold certain high offices, and who had proved their capacity to hold such offices by the probity of their conduct and their intellectual attainments—in fact, to assimilate them for certain purposes under the Criminal Procedure to European subjects. Sir Fitzjames Stephen himself had in the year 1872 declared certain people, who were neither born in the British Isles nor were the descendants of persons born in the British Isles, to be European British subjects within the meaning of the Act. The present measure was not intended to have any such far-reaching or extravagant effect. It simply meant to declare that whenever a Native of India attained a high position in the judicial service he should be raised to the status of a European British subject for the purpose of discharging certain duties which European British subjects alone could under Sir Fitzjames Stephen's Code discharge. My Lord, it is on these grounds and for these reasons that the Muhammadan community—I may say the Native community at large—have supported the measure. The interest which we have taken was no doubt of a theoretical character, and therefore we

would be glad if any satisfactory and practical solution can be provided for the difficulty which has unfortunately arisen between Government on one side and the Anglo-Indian community on the other. The proposed arrangement, however, owing to the vague and somewhat inaccurate manner in which it was put before the public, has naturally excited some alarm in the minds of the Natives of India, and the question has assumed a greater practical importance. I perfectly admit that by the arrangement in question the principle of the Bill has been thoroughly maintained with the acquiescence of the Anglo-Indians, which by removing the bitterness of the controversy constitutes no small gain to the cause of good government. At the same time, I cannot conceal from myself the fact that, unless it is carefully safeguarded, a machinery which is devised for securing the safety of European British subjects may be turned into an engine for the denial of justice to the Natives of India. It will be the duty of the Select Committee to devise sufficient safeguards against such an undesirable contingency which would be prejudicial to the best interests of the Natives and Foreigners alike. In view of the extension of the jury-system to Europeans and the expectant attitude of the Native community, it is a matter well worthy of the consideration of Government whether the jury-system or the right to claim a commitment to the Court of Sessions on the lines of the recent Summary Jurisdiction Act in England, if necessary in especially selected tracts, may not with advantage be extended to the Natives of India. The time when this matter should engage the attention of Government is one for their consideration, but I trust that an enquiry how far the boon can be granted may not be long deferred. I desire to take this opportunity to mention that I shall make certain proposals in Select Committee which are in *pari materia* with the proposed arrangement, and do not affect the European British subject, but are intended simply to ensure efficient administration of justice. I refer especially to certain modifications in section 526 of the Code. I trust that the suggestions I intend to put forward will be accepted by the Committee, as I feel sure that they will to a large extent satisfy the Native community, and at the same time place the administration of justice upon such a basis as would command the confidence and approbation of all classes of Her Majesty's subjects."

The Hon'ble MR. MILLER said:—"I have listened attentively to the statement made by the hon'ble and learned mover, and I fail to find anything in what he has said to induce me to change my opinion that the wisest and most statesman-like course would have been to have dropped this Bill long ago. Still I would at this stage do nothing to bar a settlement of the question; and, if it were possible now to refer the Bill to a Select Committee on a clear understanding of the principles on which the question is to be discussed, I should be

willing to support that course, leaving details to be settled in Committee; but I would state, in the clearest manner possible, that if there is, as I fear is the case, reason to believe there is any double meaning possible in the terms of settlement which have been announced to the public, the difficulties which have been encountered will be tenfold increased, and I cannot support the Motion that the Select Committee be directed to report in a week, unless the clearest agreement has been come to. It will not be possible otherwise to report promptly, and if it be attempted it will only lead to worse mischief."

The Hon'ble MR. GIBBON said :—"My Lord, I am not prepared to support the Motion that the Bill as it now stands shall be referred to a Select Committee; certainly not with instructions that the Committee report in a week. In an important matter such as this is, we would require to have the proposals of the Government fully laid before us. We require time to consider the provisions of the measure more carefully than we have as yet been able to do. Until now we have had before us only the Bill as originally proposed, with the concessions your Lordship, in our meeting of the 7th December, declared yourself ready to make to public opinion. Until now we have had no declaration from Government as to any further concessions it was ready to make. We had the newspaper reports of an agreement come to with the public; but I venture to say that, on comparison, it will be found that the statement now made by the hon'ble mover of the Bill is very different from the agreement published. I am ignorant of the rules of your Lordship's Council, but it seems to me that the Committee is called upon to draft a Bill, not to amend or report upon one. To draft a Bill we require to review the whole Criminal Procedure as far as it relates to Europeans: we not only require to examine the measure as it relates to the punishment to be meted out to criminals, but require to review the relations existing between a District Magistrate and his subordinates, his power of transferring a case from one file to another. Why should the European British subject be allowed trial by jury before a District Magistrate and not before his subordinate? Are we to understand that the District Magistrate is not to try minor cases? I am not prepared to send the Bill in its present form to the Select Committee, nor to see it reported on in a week."

The Hon'ble RAÍ KRISTODÁS PÁL said :—"My Lord, I approach this subject with a mingled feeling of satisfaction and sorrow—satisfaction because the settlement referred to concludes a message of peace with a body of gentlemen who, however misguided and maddened on the present occasion, are undoubtedly important factors in the cause of the advancement and regeneration of this country, and sorrow because, unless carefully safeguarded, it may open a wide door to injustice. I love peace, but honour more, and justice above all. It is

not my object to dwell on the history of the present scheme of legislation, on the bitter feelings and animosities which it has evoked, on the gradual minimization of the effect of the Bill, small by degrees and beautifully less, or on the influence which the angry discussions of the past ten months may have on the political prospects of the people. I say—let bye-gones be bye-gones. My present concern is to consider how far the proposed settlement will secure the interests and ends of justice. The primary object of your Lordship's Government in the proposed legislation has been to wipe out the brand of race-disqualification in the judiciary within certain limits in the trial of European British subjects. And that object, I am happy to observe, has been steadily kept in view, and for it our grateful thanks are due to your Excellency's Government. I must at the same time confess that the scope of the original Bill, itself a small measure, has been materially reduced by the modifications proposed from time to time. As far as I understand these modifications, both the Native and European Sessions Judges and the Native and European District Magistrates will be so far placed on a footing of equality that they will exercise equal jurisdiction over European British subjects in matters criminal. This equalization, however, has been attained not by extension, but by reduction, of power; by taking away the power of independent action of European Magistrates, and not by adding to the power of Native Magistrates. In so far, I am constrained to say, the solution of the difficulty has been achieved by an unsatisfactory process. The anomaly of race-distinction is doubtless removed as between Magistrates, but it is effected not by adding to the power of Native Magistrates, but by changing the *venu*. Race-distinction becomes most obtrusive only in the trial of a certain class of cases, and those cases are practically transferred from the file of the Native Magistrate to that of his juniors the Joint-Magistrate. Thus, the race-distinction is made more pointed and painful. If the Native Magistrate be invested with a power which he will not be called upon to exercise, that power to all intents and purposes will be an unreality. Doubtless, the European Magistrate will stand in the same position, but to him it will be obvious that it is an administrative or political exigency, and not a question of colour. It is proposed to safeguard the extension of the jurisdiction of the Native British Sessions Judge and the Native District Magistrate by giving the European subject the right to claim trial by jury in all cases. This is a right, I am quite aware, inherent in the Englishman, and an assembly of English legislators cannot but sympathise with it. I am also an advocate of jury-trial for my countrymen, and am of opinion that the jury-system ought to be extended throughout the country. But there are cases in which Englishmen in their own country cannot claim the benefit of a trial by jury, and even if the proposed modifications should pass into law, the European British subject, when

brought before a European Assistant or Joint Magistrate charged with offences of a certain class, will have no right to claim a trial by jury. The question is whether, when similarly charged before a District Magistrate, whether a European or a Native, he should consistently be permitted to demand a jury. This provision will introduce a new anomaly. In seeking to abolish one anomaly we will create another. Under the proposed settlement, the European District Magistrate will lose a power which he has exercised since the Act of 1872 without any complaint on the part of the European British subjects, while the Native Magistrate will be constantly put in mind that his power has been circumscribed because he is a Native. It may also lead to administrative inconvenience, which is worthy of serious consideration. Then, under the Act of 1872, one great reproach to the administration of criminal justice in this country, as far as the trial of the European British subject was concerned, that of dragging for trial the complainant and the accused with the whole host of their witnesses to the Presidency capitals at great inconvenience, expense and hardship, was removed because it vested the District Sessions Judge with jurisdiction with or without a jury. Under the proposed settlement, in every case before a Court of Sessions the European British subject shall have the right to claim a trial by jury. In a district where a sufficient number of Europeans and Americans may not be found to constitute a jury, the result, I take it, will be to transfer the case to a district where a jury may be available. In this way the old scandals of trials at inconveniently distant places will, I fear, be revived. Many a poor complainant may think it better to put up with the wrongs they may have sustained rather than face the hardships and expenses of a journey miles and miles away from their homes for the sake of possible redress. In this respect the proposed settlement may lead to a denial of justice. In this respect it will manifestly be a retrograde move. It will, in fact, put back the clock of improvement introduced in 1872. There is another point urged by some of my countrymen, namely, the imminent risk of failure of justice in the case of a European British subject at the hands of a European jury under the peculiar constitution of Anglo-Indian society, and a small jury of those persons. I shall briefly touch upon this point. There have undoubtedly been cases on record in which there have been egregious failures of justice. I will not say that good men and true, when sworn in as jurors, will break their oath, and amidst large communities of men of the same race and religion engaged in different occupations and not bound by near kinship or absolute identity of profession or interest it is certainly easy to empanel a jury of good men and true; but amidst a small and sparse European population in the outlying districts of India, and particularly in critical times of excited feelings, in a small jury of these persons the risk of failure of

justice is one which no Legislature should overlook. It is observable that the British Legislature has found it sometimes necessary to suspend jury-trials in Ireland. Under these circumstances, my Lord, I cannot look upon the settlement without grave misgivings. My humble belief is that it will add to the difficulties of a fair, speedy and honest administration of justice, and thus prove injurious to the people. I shall, however, propose no amendment or specific Motion now. Bearing in mind the singleness of purpose which has led your Lordship to this project of legislation, the anxiety which your Lordship has evinced to remove race-disqualifications in the discharge of judicial duties, and the earnestness with which your Lordship has sought to give effect to the noble behests of Parliament and our gracious Queen-Empress, I feel I should pause and consider. I would, therefore, reserve my objections to the details of the settlement till I see the amendments take a definite shape at the hands of the Select Committee. In the spirit of the eloquent peroration of my hon'ble and learned friend the mover of the Bill, I would venture to remind the Hon'ble Council that the stability of the British Empire in India rests on the adamantine rock of justice, and I earnestly hope that that truism will not be lost sight of by the Select Committee in framing their amendments. In conclusion, I wish to make one remark. I have no objection to the Motion that the Select Committee should report upon the Bill within one week. But I venture to express a hope that after the Bill is recast by the Select Committee it will be forwarded to the Local Governments and local officers for an expression of their opinion as to how far its provisions will be conducive to administrative convenience and to an efficient administration of justice. Great apprehensions are widely entertained that the Bill framed on the basis of the settlement will be unworkable and will defeat the ends of justice. For this reason I think it is highly desirable, my Lord, that the opinion of the local officers, who are in the best position to form a just estimate of the practical tendency of the Bill, should be taken on this vitally important point. As the Bill has been allowed to hang on for the last ten months, surely it will not prejudice any interest to delay its passing for two months more."

The Hon'ble MR. EVANS said:—"My hon'ble friend Mr. Miller has alluded to a misapprehension or misunderstanding regarding the settlement which I had thought had been finally concluded by this matter. That misunderstanding was in the first instance more extensive. It has now been narrowed down to a point which I have had but very little time to consider, in fact only a few hours, and which, therefore, I should not be inclined to pass any hasty opinion upon. I will only say that it does not, so far as I have yet been considering it, appear to me personally to be of primary importance, but the

whole value of the modification by way of settlement which we are discussing to-day appears to depend upon whether or not they are accepted by the European community. I have had no time—a few hours only have elapsed since the matter has arrived at this stage—and I have had no opportunity of consulting the European community or their leaders upon it, and my view is, as I have said, that the advisability of sending the question into Select Committee on the lines indicated by the hon'ble mover of the Bill appears to depend upon the acceptance of those terms by the European community, and I feel I shall do no good by making any observations upon it at present. I shall, therefore, feel very much obliged to your Lordship if your Lordship will adjourn this debate. I do not know whether I shall be in order in formally moving an adjournment, but, if your Lordship will adjourn the Council meeting, I hope some settlement will be arrived at which will prove satisfactory."

His Excellency THE PRESIDENT said:—"I feel some hesitation in complying with the proposal which has been made by my hon'ble and learned friend, because the effect of that proposal will be to shut myself, and those of my hon'ble colleagues who may desire to speak on this occasion, out of the debate until the day to which the Council may be adjourned. I am always, however, most anxious to treat every member of this Council with the utmost consideration and courtesy. My hon'ble and learned friend says that he has not had time to consider a question which has arisen while he has been absent from Calcutta. Under these circumstances, it seems to me that I should not be justified, in courtesy to my hon'ble and learned friend, in asking him to address the Council at the present moment, but, in agreeing now to an adjournment of the Council, I do so without prejudice, without in any way committing myself with regard to the point to which Mr. Evans has alluded. I agree, therefore, to the adjournment of the debate till Monday next at half-past 11."

The Council adjourned to Monday, the 7th January, 1884.

D. FITZPATRICK,
Secretary to the Government of India,
Legislative Department.

FORT WILLIAM;
The 11th January, 1884.

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